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No. 85-766

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

JULIA H. TASHJIAN,
Secretary of the State of Connecticut,

Appellant,

—v.—

REPUBLICAN PARTY OF THE STATE OF CONNECTICUT, LOWELL P. WEICKER, JR., STEWART B. MCKINNEY, NANCY L. JOHNSON and THOMAS J. D'AMORE, JR.,

Appellees.

ON APPEAL FROM THE UNITED STATES
COURT OF APPEALS FOR THE SECOND CIRCUIT

APPELLEES' MOTION TO DISMISS OR AFFIRM

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REPUBLICAN PARTY OF THE STATE OF CONNECTICUT, LOWELL P. WEICKER, JR., STEWART B. MCKINNEY, NANCY L. JOHNSON and THOMAS J. D'AMORE, JR.,

Appellees.

ON APPEAL FROM THE UNITED STATES
COURT OF APPEALS FOR THE SECOND CIRCUIT

APPELLEES' MOTION TO DISMISS OR AFFIRM

Appellees, the Republican Party of the State of Connecticut [the "Party"] and four of its members, move pursuant to Rule 16 of the Revised Rules of this Court to dismiss the appeal from the decision of the Court of Appeals below or, in the alternative, to affirm the decision of the Court of Appeals, on the ground that this case presents no substantial question not previously decided by this Court.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 770 F.2d 765 (1985), and has been submitted by appellants at App. 1-141. The final opinion of the District Court is reported at 599 F. Supp. 228 (1984). A substantially similar earlier version of the District Court opinion has been submitted by appellants at App. 142-212.

QUESTIONS PRESENTED

1. Is appellate review warranted of the holding of the Court of Appeals that appellees' decision to open and expand the membership of their political party is constitutionally protected by First and Fourteenth Amendment freedoms of political association?

2. Is appellate review warranted of the holding of the Court of Appeals that a state statute that substantially intrudes on a political party's constitutional rights of association may only be upheld if narrowly drawn and justified by compelling state interests?

3. Is appellate review warranted of the determinations by the District Court and Court of Appeals that appellant did not, on the facts of this case, prove the existence of compelling state interests or of a narrowly tailored state intrusion, as necessary to sustain the state statute at issue?

4. Is appellate review warranted of the holding of the Court of Appeals that Article 1, § 2 and the Seventeenth Amendment do not preclude the party rule at issue in this case?

STATEMENT OF THE CASE AND PROCEEDINGS BELOW

This is an appeal from the decisions below enjoining the enforcement of a Connecticut statute which, as "applied to the [appellee] Republican Party rule permitting unaffiliated voters to participate in certain Republican primaries . . . abridges the right of association guaranteed by the First Amendment." *Republican Party of State of Connecticut* v. *Tashjian*, 599 F. Supp. at 1241 [App. 196-97].

The Republican Party is a major political party in the State of Connecticut, consisting of individuals who associate themselves for the common advancement of political beliefs and ideas. [App. 245]. For some time, Republicans have been substantially outnumbered in Connecticut by registered Democrats and by registered but unaffiliated voters.[1] As a result, the Party has had limited success since 1958 in statewide elections for Governor, United States Senator and Representative.[2]

In January 1984, the Party formally adopted an amendment (the "Rule") to its party rules to allow unaffiliated voters in Connecticut to join enrolled Republicans in voting in Republican Party primaries for candidates for the offices of United States Senator, United States Representative, Governor and the gubernatorial underticket. The Rule does not affect the statutory requirements which must be met by Republican Party

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1 At the time this action was commenced, there were 659,268 registered Democrats, 532,723 registered but unaffiliated voters and 425,695 registered Republicans in Connecticut. [App. 244]. As of January 1985, there were 718,772 registered Democrats, 608,613 registered but unaffiliated voters and 477,749 registered Republicans. *The Hartford Courant*, Jan. 4, 1985 at A6 [App. 20-21 n. 4].

2 Since 1958, Republicans have won only 4 of 16 statewide elections for Governor and United States Senator. During the same time period, Republicans were victorious in only 25 of 84 of the elections for United States Representative. *See* State of Connecticut Register and Manual 72-82 (1983); 42 Cong. Q. 2923 (Nov. 10, 1984).

candidates to qualify for placement on the primary ballot.[3] Specifically, the Rule provides as follows:

> Any elector enrolled as a member of the Republican Party and any elector not enrolled as a member of a party shall be eligible to vote in primaries for nomination of candidates for the offices of United States Senator, United States Representative, Governor, Lieutenant Governor, Secretary of the State, Attorney General, Comptroller and Treasurer.

[App. 251-52].

This Rule is in direct conflict with Section 9-431 of the Connecticut General Statutes ("the statute"), which prohibits unaffiliated voters from voting in any party primary. The statute provides, in pertinent part, that:

> No person shall be permitted to vote at a primary of a party unless he is on the last-completed enrolment list of such party in the municipality or voting district, as the case may be. . . .

[App. 254].

In an attempt to avoid the conflict between the party Rule and the statute, Republican legislators introduced legislation during the 1984 and 1985 sessions of the Connecticut General Assembly to amend Section 9-431. The principal legislative proposal would have enabled the Republican Party to implement its Rule by amending the statute to provide that:

> EXCEPT WHERE PROVIDED OTHERWISE BY STATE PARTY RULES, no person shall be permitted to vote at a primary of a party unless he is on the last-completed enrolment list

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3 Pursuant to Sections 9-372 *et seq.* of the Connecticut General Statutes, a candidate must receive twenty (20%) percent of the vote cast at the party's nominating convention to qualify for placement on the ballot. Delegates to the convention are selected from and by party members only. The Rule does not affect the composition of the party nominating convention.

> of such party in the municipality or voting district, as the case may be. . . .

[App. 255-56]. This proposed legislation is similar to the laws in effect in Alabama, Alaska and South Carolina, which provide that a party shall establish the qualifications for participation in its party primaries. *See* Ala. Code § 17-16-14; Ark. Acts §§ 3-102, 3-115; S.C. Code Ann. § 17-9-20.

During the course of state legislative hearings on the proposed legislation, the director of appellant's elections division testified that this proposal was administratively workable. [App. 257 Record 51-52 (Joint Submission of Documents, Exhibit P)].

The proposed legislation to allow implementation of plaintiffs' Rule was defeated in 1984 in committee and in both houses of the Connecticut legislature by the Democratic Party, which then controlled both houses. [App. 23-29, 255-61]. The legislation was passed in 1985 by the presently-Republican controlled Connecticut legislature, but Democratic Governor William A. O'Neill vetoed the bill. [App. 28-29 n. 7].

Appellees commenced this action in May 1984, after the first unsuccessful effort to enact legislation. The parties joined in filing a Joint Statement of Facts, Supplemental Joint Statement of Facts and Joint Submission of Documents. Appellees thereafter moved for summary judgment and appellant filed a motion to dismiss.

On December 5, 1984, the District Court granted appellees' motion for summary judgment and denied appellant's motion to dismiss. The court held that the statute imposed substantial burdens on appellees' right of association under the First and Fourteenth Amendments to the United States Constitution. The court further held that appellant had not proved the existence of any compelling state interests necessary to sustain the statute or that the statute was narrowly drawn to serve the interests asserted by the State. The court therefore enjoined

enforcement of the statute, as applied to the Republican Party Rule.

On August 8, 1985, the Court of Appeals affirmed, agreeing that the State had failed to prove any compelling interests or precise tailoring to justify the statutory infringement on appellees' First and Fourteenth amendment rights to freedom of association.

A notice of appeal to this Court was filed in the Court of Appeals on September 20, 1985, and appellant's Jurisdictional Statement was filed on November 4, 1985.

ARGUMENT

THIS CASE PRESENTS NO SUBSTANTIAL QUESTION NOT PREVIOUSLY DECIDED BY THIS COURT

A. THE LOWER COURTS PROPERLY ANALYZED AND RESOLVED THE FREEDOM OF ASSOCIATION ISSUES IN ACCORDANCE WITH WELL-ESTABLISHED FIRST AND FOURTEENTH AMENDMENT PRECEDENT.

In the principal argument on appeal, appellant [the "State"] mounts a three-pronged attack on the First Amendment analysis utilized by the lower courts in holding § 9-431 unconstitutional as applied. The State contends

> (1) that the statute does not substantially infringe on appellees' protected rights of association;
>
> (2) that the lower courts applied an erroneous standard of constitutional review—strict judicial scrutiny—to the statutory analysis; and
>
> (3) that, when viewed under a proper standard, the State's interests in the integrity of the primary election process validate the statute.

Appellees submit that, although the issues raised in this case are important, the lower courts' resolution of them is in accord with well-established First and Fourteenth Amendment precedent and does not warrant appellate review by this Court.

1. *Appellees' Rights of Association*

In enacting the Rule, the Republican Party opened its party processes to new members, attempting to expand its membership by obtaining the support and participation of a new group of voters in the Party's candidate selection process. The Rule reflects a declaration by the Party of its willingness to associate with voters previously excluded from party decisions, and to allow those new voters a voice in determining party candidates and by necessary implication, party philosophy as well. Through such association with, participation of and guidance from unaffiliated voters, the Republican Party seeks to increase its base of popular support in Connecticut and improve its chances of obtaining its ultimate goal, success in the general elections. *See Storer* v. *Brown*, 415 U.S. 724, 745 (1974).

These activities are fundamental and well-established components of a political party's freedom of association under the First and Fourteenth Amendments. It is, of course, beyond dispute that "the First Amendment protects political association as well as political expression," *Buckley* v. *Valeo*, 424 U.S. 1, 15 (1976), and that the "First Amendment freedom to gather in association for the purpose of advancing shared beliefs is protected by the Fourteenth Amendment from infringement by any State." *Democratic Party of the United States* v. *Wisconsin*, 450 U.S. 107, 121 (1981) ("*Democratic Party*"); *Kusper* v. *Pontikes*, 414 U.S. 51, 56-57 (1973).

This Court has expressly recognized that a political party's freedom to associate "necessarily presupposes the [party's] freedom to identify the people who constitute the association." *Democratic Party*, *supra* at 122. Absent constitutionally impermissible criteria, a political party's freedom to choose its members and its requirements for participation in party affairs

remains absolute. "[T]he stringency, and wisdom, of membership requirements is for the association and its members to decide—not the courts—so long as those requirements are otherwise constitutionally permissible." *Id.* at 123 n. 25. "[A] State, or a court, may not constitutionally substitute its own judgment for that of the Party." *Id.* at 123-24; *cf. Ripon Society, Inc.* v. *National Republican Party*, 525 F.2d 567, 585 (D.C.Cir. 1975) (*en banc*).

A party's freedom to choose with whom and how it will associate is nowhere more fundamental than in its candidate selection process. "A basic function of a political party is to select the candidates for public office to be offered to the voters at general elections. A prime objective of most voters in associating themselves with a particular party must surely be to gain a voice in that selection process." *Kusper* v. *Pontikes*, *supra* at 58. Individuals enjoy the right to associate with the candidate of their choice and with his supporters, whether by contributing money to or working for the candidate's campaign, or by supporting the candidate in the primary or general election. *See Buckley* v. *Valeo*, *supra*. "Any interference with the freedom of a party is simultaneously an interference with the freedom of its adherents." *Democratic Party*, *supra* at 122; *Sweezy* v. *New Hampshire*, 354 U.S. 234, 250 (1957).

These associational rights are especially important to a minority party, as the Republican Party is in the State of Connecticut. *See* note 1, *supra*. In order to achieve electoral success, it is clear that a minority party must obtain new adherents, a process that may necessarily require attempts to join with other minority groups or individuals, producing a reformulation of ideas and programs as new coalitions are formed. A vital and diverse political process demands unrestricted freedom to attempt such associations.

The Court of Appeals correctly held that the Connecticut statute, § 9-431, precludes the Republican Party from exercising these fundamental rights. The Party's efforts to open the Party to new members and to obtain the support and participa-

tion of new voters in the candidate selection process are directly prohibited by the statute. The Party's efforts to increase the popular base for its candidates and improve its likelihood of success in the general elections are also frustrated. Most important, the political diversity of the Party's platform and programs is limited, as it is denied the electoral input of a new group in the candidate selection process and the concomitant responsiveness of its candidates to issues of concern to a more broadly-based electorate.

Appellees submit that the Court of Appeals correctly held, on the basis of well-established constitutional authority, that "Section 9-431 substantially interferes with the Republican Party's first amendment right to define its associational boundaries, determine the content of its message, and engage in effective political association." *Republican Party* v. *Tashjian*, *supra* at 283 [App. 98].

2. *The Constitutional Standard of Review.*

State infringement upon the right of political association—like infringement upon freedom of speech—is subject to the "closest scrutiny." *NAACP* v. *Alabama*, 357 U.S. 449, 460-61 (1958). This Court has, thus, repeatedly held that a state statute that imposes substantial burdens on a political party's right of political association is unconstitutional unless the State demonstrates a compelling state interest and employs precisely tailored means to avoid unnecessary abridgement of associational freedoms. *Roberts* v. *United States Jaycees*, ____ U.S. ____, 104 S.Ct. 3244, 3258 (1984); *Democratic Party*, 450 U.S. at 124; *Buckley* v. *Valeo*, 424 U.S. at 25; *Cousins* v. *Wigoda*, 419 U.S. at 489; *Williams* v. *Rhodes*, 393 U.S. 23, 21 (1968); Note, *Primary Elections and the Collective Right of Freedom of Association*, 94 Yale L.J. 117, 124 (1984).

The standard of review applicable to § 9-431 is thus clear and was correctly identified by the Court of Appeals. [App. 77]. Appellate review of the proper standard is plainly unnecessary.

3. *The Sufficiency of the State's Interests.*

The Court of Appeals and the District Court held, on the basis of the evidence presented by the State and in the specific factual context of the Republican Party's Rule, that the State had not met its burden of demonstrating a narrowly drawn regulatior that serves compelling state interests.[4] The State may disagree with the lower courts' conclusions, but it has failed to specify any clearly erroneous factual findings that would warrant further review by this Court of the conclusions reached at the two levels below. *International Brotherhood of Teamsters* v. *United States Attorney*, 431 U.S. 324, 343 (1977); *Blau* v. *Lehman*, 368 U.S. 403, 408-09 (1962).

The courts below did not credit the "parade of horribles" proffered by the State in defense of the statute. [App. 120]. The courts found the State's claims that implementation of the rule would result in voter confusion, administrative chaos and disruption of the two party system factually without merit.

More fundamentally, however, the State has no legitimate interest in requiring the Republican Party to maintain a given party ideology or constituency. There can be no distortion of the party's philosophy from the inclusion of unaffiliated voters, where the party has specifically sought their input. The two party system is not undermined by one party's expansion of its electoral base, and even if a party adopts a self-destruc-

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4 In its Jurisdictional Statement, the State has referred to the three-judge court's decision in *Nader* v. *Schaffer*, 417 F. Supp. 837, *aff'd. mem.*, 426 U.S. 989 (1976), in support of its constitutional analysis here. *Nader*, however, presented a fundamentally different situation than the facts here: in *Nader*, the plaintiffs were unaffiliated Connecticut voters suing in an attempt to force political parties to allow them to participate in party activities from which they were excluded by party rule. The constitutional association rights of the parties were, under such circumstances, in conflict with and paramount to any association rights possessed by the unaffiliated voters. The three-judge court's analysis of the association issues thus resulted in upholding the statute and the parties' positions. In the instant case, the Republican Party is attempting to open its membership to unaffiliated voters, and the resulting constitutional analysis of the Party's association freedoms and the State's statutory interests is different.

tive course of action, the State has no right to interfere. *Democratic Party*, 450 U.S. at 123-24. Similarly, the State's concern for "raiding" is without basis where the Party has, by definition, invited the purported raiders to participate. The State's claims in support of the statute amount to an attempt—for whatever reasons—to freeze the Republican Party in a *status quo*, minority position, and were properly rejected as such by the lower courts. [*See* App. 195, 119, 123].[5]

B. NEITHER ARTICLE 1, SECTION 2, NOR THE SEVENTEENTH AMENDMENT BARS THE RULE ADOPTED BY APPELLEES

The State also contends that the Party's Rule is unconstitutional under Article 1, Section 2 and the Seventeenth Amendment to the United States Constitution because it establishes different qualifications for voting in Republican primaries for federal and state representatives. The State argues that these constitutional provisions require absolute symmetry in voter

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5 The State also asserts a constitutional authority, under Article 1, Section 4 and the Tenth Amendment, to regulate elections. The State's reliance on these constitutional provisions does not alter the applicable First Amendment analysis. Appellees recognize that a state has the right, subject to certain limitations, to regulate the manner in which an election—including a party primary—is conducted. Such regulation is permissible to prevent fraud in the election and to ensure the integrity of the process. *See, e.g., Rosario* v. *Rockefeller*, 410 U.S. 752, 761 (1973); *Bullock* v. *Carter*, 405 U.S. 134, 145 (1972); Note, *Primary Elections: The Real Party in Interest*, 27 Rutgers L. Rev. 298, 301 (1974).

However, a state's right to impose "time, place and manner" regulations is limited by first amendment and other constitutional protections. *See, e.g., Garcia* v. *San Antonio Metropolitan Transit Authority*, ___ U.S. ___, 105 S.Ct. 1005 (1985); *Rivera-Rodriguez* v. *Popular Democratic Party*, 457 U.S. 1, 13 (1982) ("[a]bsent some clear constitutional limitation"); *Oregon* v. *Mitchell*, 400 U.S. 112, 125 (1970) ("within the limits of the Constitution"). A "time, place and manner" statute which infringes upon a protected first amendment right will be upheld only if it furthers a compelling state interest. *See, e.g., Democratic Party*, 450 U.S. at 124-25; *Kusper* v. *Pontikes*, 414 U.S. at 58-59.

eligibility for state and federal legislative primaries.[6] This contention—which was labeled "specious" by Judge Oakes below [App. 133]—is plainly without merit.

The "qualifications clause" in Article 1, Section 2 (and later repeated in the Seventeenth Amendment) was adopted as a compromise by the Framers to permit suffrage to be determined by reference to state law while insuring that the states could not establish stricter voting requirements for the selection of federal legislators than they had for state legislators. *See* I Story, *Commentaries on the Constitution of the United States* § 583, p. 405, §§ 583-84, pp. 405-07 (2d ed. 1851); D. Hutchinson, *The Foundations of the Constitution* 31 (1928).

The founding fathers were concerned that discrimination against federalism would lead states to exclude voters from congressional elections, thereby "render[ing] too dependent on the State Governments, that branch of Federal Government, which ought to be dependent on the people alone." *The Federalist* No. 52, at 354 (J. Madison) (J. Cooke ed. 1961); *see also The Federalist* No. 57, at 385 (J. Madison).

Thus, the Framers adopted the qualifications provision of Article 1, Section 2, allowing the states to maintain their own voter qualifications while at the same time ensuring that the states would not utilize more restrictive voter qualifications for federal representatives. *See The Federalist* No. 52, at 326, 354 (J. Madison).

Appellees' Rule is consistent with the language and intent of Article 1, Section 2. Any elector qualified to vote in a Republican Party primary for state representatives is also eligible to vote in the congressional primaries. No voter qualified in the state office primaries is excluded from the congressional pri-

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6 The qualifications clause of Article 1, Section 2 provides, as follows:

". . . the Electors in each State shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature."

The Seventeenth Amendment contains similar language.

maries; to the contrary, the Rule operates to include additional voters in such primaries.

The State cites no authority for its claim that absolute symmetry of voter eligibility in state and federal office primaries is required, nor has it ever attempted to respond to the history of Article 1, Section 2.[7] As the District Court stated after reviewing the history and purpose of the qualifications provision, "neither the language nor the history of Article 1, Section 2 precludes a more expansive classification of eligible voters in congressional as opposed to state legislative elections." [App. 168].[8]

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7 The Seventeenth Amendment was also clearly intended to open the political process to more people. *See, e.g.*, H.R. Rep. No. 2, 62d Cong., 1st Sess. (1911); 47 Cong. Rec. 231 (1911) (statement of Rep. Norris) (amendment "is a step toward placing the real government in the hands of the people themselves").

8 Moreover, there is substantial question whether the "qualifications clause" even applies to voter eligibility for primaries. The state relies on *United States* v. *Classic*, 313 U.S. 299 (1941), and the White Primary Cases, *see e.g. Terry* v. *Adams*, 345 U.S. 461 (1953); *Smith* v. *Allwright*, 321 U.S. 649 (1944), as support for this position, but miscontrues the meaning of these cases, which establish that a political party has the right to determine its membership and candidate selection process without state interference as long as it does not engage in invidious discrimination or rely on other constitutionally impermissible criteria. *Democratic Party* v. *Wisconsin*, 450 U.S. at 123 n. 25; *see* L. Tribe, *American Constitutional Law* 787-90 (1978); Kester, *Constitutional Restrictions on Political Parties*, 60 Va. L. Rev. at 756-60; Blumstein, *Party Reform, the Winner-Take-All Primary, and the California Delegate Challenge: The Gold Rush Revisited*, 25 Vand. L. Rev. 975, 991-92 (1970).

CONCLUSION

For the foregoing reasons, Appellees' Motion to Dismiss or, in the alternative, Affirm this appeal should be granted.

Respectfully submitted,

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